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NOTE AND COMMENT.

RELEASE FROM LIABILITY FOR DEATH BY WRONGFUL ACT.—Lord Campbell's Act, creating a right of action in favor of the families of persons killed by the wrongful acts of others, was passed in England in 1846. The next year New York adopted a similar statute, and the other states have followed its lead. Endless litigation has grown out of this legislation, the keen edge of which has hardly been dulled by the passing years, and among the many questions which have arisen, one of the most interesting is that touching the validity of releases from liability under the Act.

In *Perry* v. *Philadelpiha, B. & W. R. R. Co.* (1910), — Pennewill —, (Del.), 77 Atl. 725, an express messenger was killed by defendant's negligence. The Express Company had by contract agreed to hold the Railroad Company harmless, and the Express Company had exacted from its messenger an agreement that he would assume all risk of injury by reason of the negligence of the Railroad Company. Was this contract such a release as precluded an action under the statute?

The question in this case was complicated by the fact that the release was executed before the injury, so that the broad problem of public policy as affecting contracts of exemption from liability for negligence, was in-

volved. The court, however, held the contract valid in so far as it was assailed on this ground, and proceeded to consider its effect upon the statutory action for death by wrongful act.

Inasmuch as the statute created a right in the wife and next of kin of the deceased, could the latter, by contract in his life time, destroy that right? It was held that he could; that the right given to the widow and children was merely a right to recover damages for the wrongful act provided the defendant might have brought suit had he lived; and that any act on the part of the deceased which might have been pleaded in bar had he survived the injury, was equally available to the defendant when sued by the beneficiaries under the statute.

Conceding the validity of the release as such, this doctrine seems well authenticated. *Adams* v. *Northern Pacific R. R. Co.,* 192 U. S. 445; *Hodge* v. *Rutland R. R. Co.,* 112 App. Div. 142, affirmed in 194 N. Y. 570; *Sewell* v. *Atchison, T. & S. F. Ry. Co.,* 78 Kan. 1, 96 Pac. 1007; *Western & Atlantic R. R. Co.* v. *Strong,* 52 Ga. 461. Where the release is executed by the deceased during the period of his survival after the injury, the question of public policy does not enter, and the release should, on analogous principles, always destroy the right otherwise available under the statute. *Stroude* v. *St. Louis Transit Co.,* 197 Mo. 616, 95 S. W. 851; *Brown* v. *Electric Ry. Co.,* 101 Tenn. 252, 47 S. W .415, 70 Am. St. Rep. 666; *Southern Bell Telephone Co.* v. *Cassin,* 111 Ga. 575, 36 S. E. 881; *Hill* v. *Pennsylvania R. R. Co.,* 178 Pa. St. 232, 35 Atl. 997. In *Mooney* v. *City of Chicago,* 239 Ill. 414, 88 N. E. 194, the deceased had released one of two joint tort feasors, and it was held, reversing the Appellate Court, that such a release was a bar to an action under the statute for wrongfully causing death.

A curious limitation upon this rule has been made by the Supreme Court of Kansas, to the effect that, while the deceased may in his life time bargain away all rights which his family might otherwise assert by reason of his death, he nevertheless cannot *limit* the *amount* of the recovery subsequently to be obtained by his family. In other words, he can destroy but cannot diminish their claim; he can reduce it to nothing, but cannot reduce it to any sum greater than nothing. This was declared in *Sewell* v *Atchison, T. & S. F. Ry. Co.* (supra) to be the real holding in *Railway Co.* v. *Martin,* 59 Kan. 437, 53 Pac. 461, and the latter case as so interpreted was approved. A technical argument may be made to sustain this doctrine. It may be said that the death act substitutes a cause of action in the family for the cause of action in the deceased, and if anything at all remains of the latter cause of action, the substitution of the entire right created by statute at once arises by operation of law, but that if the deceased has released his entire right, there is nothing for which the right in the family can serve as a substitute and hence it fails *in toto.* Substantially, however, the rule denies that the whole includes the parts, and it permits the deceased in his life time to exercise control over the existence of the right in his family but not over its extent.

After the cause of action has once accrued in favor of the family of the deceased, such cause of action is under the control of the statutory benefic-

iaries. Thus, a sole beneficiary under the death act may make a valid release of her right. *McKeigue* v. *Chicago & N. W. R. R. Co.*, 130 Wis. 543, 110 N. W. 384. But where there are several beneficiaries, a release by one cannot affect the rest, so that a widow who accepts a relief benefit in satisfaction of her claim for the death of her husband, does not thereby release the claims which her children may have had, and she may sue as administratrix for the loss which the children have sustained. *Chicago, B. & Q. R. R. Co.* v. *Wymore*, 40 Neb. 645, 58 N. W. 1120; *Chicago, B. & Q. R. R. Co.* v. *Healy* (Neb.), 111 N. W. 598. E. R. S.

THE POWER OF A CITY TO ACQUIRE OR BUILD SUBWAYS.—At the present time, when questions of municipal control and ownership of public utilities are receiving so much attention, the struggles of a great city like Chicago to secure control and provide for the future ownership by the city of its street railway system, if that shall be advisable, cannot fail to be of interest to all. One more chapter is added to the history of this struggle by a recent decision of the Supreme Court of Illinois in the case of *Barsalaux et al.* v. *City of Chicago et al.*, decided June 29, 1910, and reported in 92 N. E. 525, affirming the decision of Judge GEORGE A. CARPENTER, then of the Cook County Circuit Court, now Judge of the United States District Court for the Northern District of Illinois.

Action was brought in this case by a citizen and taxpayer of the city of Chicago against the city and certain of its officers to have the general appropriation ordinance of March 8, 1909, declared unconstitutional and void and for an injunction restraining the defendants from taking any further steps or incurring further expense in connection with the preliminary subway project in harmony with the provisions of two ordinances passed by the city council on February 11, 1907, granting franchises to Chicago City Railway Company and Chicago Railways Company which authorized these corporations to construct, maintain and operate street railway systems in the city of Chicago. At the time of the passage of these ordinances the franchises of several of the corporations owning and operating lines of street railway in the city had expired or were about to expire, the system of street railways as a whole was disintegrated and the equipment antiquated and delapidated. The purpose of these ordinances was to secure for the city the immediate improvement and rehabilitation of its street railway system by private companies, subject to a large control by, and a profit-sharing arrangement with, the city, and to provide for the future acquirement of the system by the city itself should such a step be deemed advisable by the citizens of Chicago. The appropriation ordinance of March 8, 1909, was attacked on the ground that it provided for the appropriation of the sum of fifty thousand dollars out of the amount to be paid to the city of Chicago by the Chicago City Railway Company and the Chicago Railways Company under the ordinances of February 11, 1907, for bearing the expenses of an investigation and report as to the desirability of constructing subways as provided by the said ordinances, and twenty-five thousand dollars out of the